

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 19[REDACTED] 1921

No. 565. [REDACTED] 11

WILSON SCOTT NORRIS, APPELLANT,

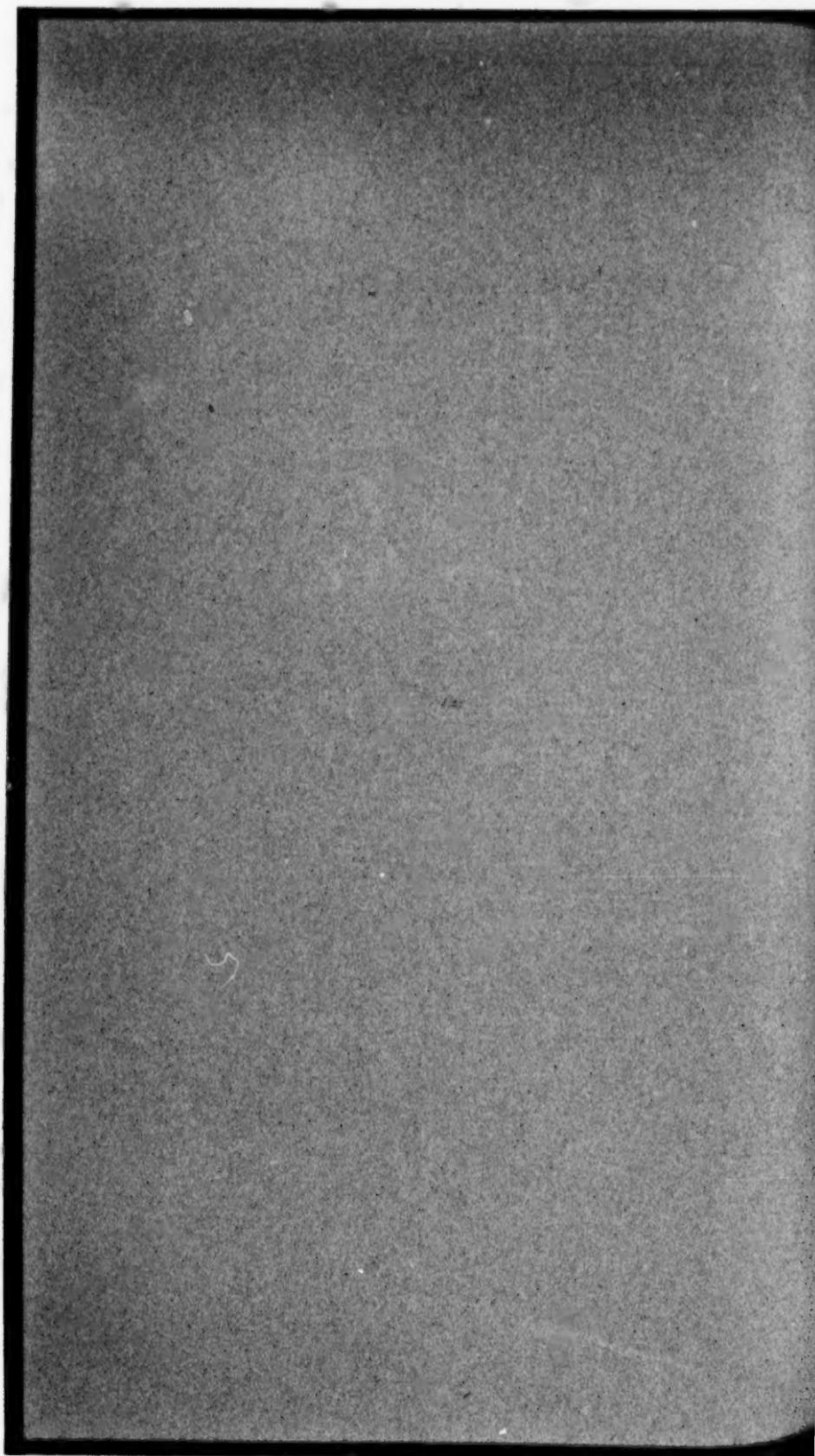
vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 18, 1918.

(26,651)



(26,651)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 565.

WILSON SCOTT NORRIS, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1. *Original Petition.*

Filed May 23, 1916.

In the Court of Claims.

No. 33262.

WILSON SCOTT NORRIS
vs.
THE UNITED STATES.*Petition.*

To the Chief Justice and Judges of the Court of Claims:

The claimant respectfully represents and shows:

I. Claimant is a citizen of the United States and a resident of the State of Virginia.

II. Claimant was appointed to the office of Inspector of Customs, in and for the Port of Baltimore, Maryland, on July 2nd, 1907. After taking the oath of office for said office on said date, claimant was paid the compensation of Four (\$4.00) dollars per diem for every day in the year. This appointment was made by the Secretary of the Treasury upon the nomination of the Collector of the Port of Baltimore.

2 III. Claimant continued under said appointment in said port at said compensation, to and including the 20th day of February, 1913. During the period between July 2nd, 1907 and February 20th, 1913, both dates inclusive, claimant received the full compensation of Four (\$4.00) dollars per diem for every day in the year. On said date of February 20th, 1913, claimant was summarily discharged from the service of the United States by the Collector of the Port of Baltimore, who acted pursuant to instructions issued by the Secretary of the Treasury. No charges of any nature whatsoever were preferred against claimant, and no reasons were given to claimant for his removal.

IV. Claimant avers that his summary removal from the service of the United States, as aforesaid, was unlawful, invalid and of no force and effect, because it was contrary to Section VI. of the Act of Congress, approved August 24, 1912. (37 Stat. 555).

V. Following his removal, claimant made repeated requests upon the Treasury Department through the local officials at the Port of Baltimore for the reasons that caused his removal, and submitted applications at various times for his reinstatement. On March 5, 1914 claimant was restored to duty as an Inspector of Customs in and for the said Port of Baltimore, but was immediately suspended and charges in writing were preferred against him, and a copy thereof furnished to him with the notification that he was to answer said charges within three days after the receipt thereof. Claim-

3. Claimant submitted his answer to said charges to the Collector of the Port of Baltimore, and after due consideration thereof, the Treasury Department advised claimant through the said Collector of the Port of Baltimore, that the charges were not sufficient to have warranted claimant's dismissal from the service. The Treasury Department, however, informed claimant that there was no vacancy in the Port of Baltimore at that time to which he could be appointed, inasmuch as the position previously held by claimant had been filled by the appointment of another employee. Claimant was removed again on April 29, 1914, because it was alleged that there was no vacancy to which he could be appointed. Thereafter, and upon different occasions, claimant requested his reinstatement as an Inspector of Customs in and for the said Port of Baltimore, but said applications were consistently denied, solely on the ground that claimant's position had been filled by the appointment of another person, and that there were no vacancies in said office. Claimant has not received any part of the compensation for the said office of Inspector of Customs since the said 20th day of February, 1913.

VI. Claimant was, by virtue of his appointment, an employee of the Civil Service of the United States, under the Act of Congress, January 16, 1883, known as the Civil Service Law.

VII. During all the time from the date of claimant's removal on February 20th, 1913, as heretofore alleged, claimant has stood ready, willing and able to perform the duties of the office to which 4. he was legally appointed, and from which he was illegally separated. Claimant avers that he has been prevented from performing the duties of said office by direction of the Secretary of the Treasury or his subordinates.

VIII. Claimant avers that he was, and is, entitled to the compensation of Four (\$4.00) dollars per diem for each and every day from the 20th day of February, 1913 to and including the 20th day of May, 1916, eleven hundred eighty-five (1185) days, amounting to Forty-Seven Hundred Forty (\$4740.) dollars.

IX. Claimant is the sole owner of this claim, no other person or corporation is interested therein, and no assignment or transfer of the claim, or any part thereof, or interest therein, has been made.

X. Claimant is justly entitled to the amount herein named from the United States, as he is advised and believes, after allowing all just credits and set-offs.

Wherefore, he prays judgment against the United States for the sum of Forty-Seven Hundred Forty (\$4740.) dollars.

SPOOR & RUSSELL.

Attorneys of Record.

DUDLEY & MICHENER,
Of Counsel.

5. STATE OF NEW YORK,
County of New York, ss:

Personally appeared before me, a notary public, in and for the County of New York, William E. Russell, who being sworn according to law, deposes and says: that he is a member of the partnership

of Spoor & Russell, which partnership has been duly authorized by power of attorney, to represent the claimant and verify pleadings in this case; that he has read and understands the foregoing petition, and that the matters and things therein stated are true in substance and in fact, as he is informed and believes.

WILLIAM E. RUSSELL.

Subscribed and sworn to before me this 22nd day of May, 1916.

[SEAL.]

E. E. LEVINE,
Notary Public, Kings Co.

Cert. filed N. Y. Co. County Clerk's Nos.; Kings Co. 77; N. Y. Co. 230. Register's Nos.; Kings Co. 8081; N. Y. Co. 8200.

Commission expires March 30, 1918.

6 H. *Claimant's Amendment to Petition.*

Filed, by Leave of Court, October 17, 1917.

To the Chief Justice and Judges of the Court of Claims:

The claimant respectfully amends the petition as follows:

Amended Paragraph VIII.

Claimant avers that he was and is entitled to the compensation of Four (\$4) Dollars per diem for each and every day from the 20th day of February, 1913, to the day of rendering judgment in this case, the amount due to, and including the 30th day of September, 1917, being Six thousand seven hundred thirty-two (\$6,732) Dollars.

Amended Conclusion of Law.

Wherefore, claimant prays judgment against the United States for the sum of Six thousand seven hundred thirty-two (\$6,732) Dollars, the amount due at this time, and for such additional amount as may be due at the date of rendering judgment herein.

SPORR & RUSSELL,
Attorneys of Record,

DUDLEY & MICHENER,
Of Counsel.

STATE OF NEW YORK,
County of New York, ss:

Personally appeared before me, a notary public in and for the County of New York, William E. Russell, who being sworn according to law deposes and says that he is a member of the partnership of Spoor & Russell, which partnership has been duly authorized by power of attorney to represent the claimant and verify pleadings in this case; that he has read and understands the foregoing amendments of petition, and that the matters and things therein stated are true in substance and in fact, as he is informed and believes.

WILLIAM E. RUSSELL.

7 Subscribed and sworn to before me this 2nd day of October, 1917.

[SEAL.]

GEORGE E. BROWN,
Notary Public, Richmond County.

Certificate filed in New York County No. 321,
New York Register No. 9289,
Term expires March 30, 1919.

III. *General Traverse,*

Court of Claims,

No. 33262.

WILSON SCOTT NORRIS

VS.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

IV. *Argument and Submission of Case,*

On March 6, 1918, this case was argued and submitted on merits by Mr. W. E. Russell, for the claimant, and Mr. Harvey D. Jacob, for the defendants.

8 V. *Findings of Fact and Conclusion of Law,*

Entered May 13, 1918.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact,

I.

The plaintiff, William Scott Norris, is a citizen of the United States and a resident of the State of Virginia and was duly appointed an inspector of customs in the port of Baltimore on July 2, 1907, at a compensation of \$4 per diem for every day in the year. He continued under the aforesaid appointment to and including the 20th day of February, 1913. On that day he was summarily discharged from the service of the United States by the collector of customs of the port of Baltimore pursuant to instructions issued by the Secretary of the Treasury.

At the time of his discharge from said service he was in the

classified civil service of the United States. Before and at the time of his discharge aforesaid charges had been preferred against him by a committee appointed by the Secretary of the Treasury to 9 examine into and report upon the conduct of customs business at Baltimore. The said William Scott Norris was not furnished with a copy thereof, nor was he allowed a reasonable time for personally answering the same in writing.

II.

On March 5, 1914, plaintiff was restored to the said office pursuant to the direction of the Secretary of the Treasury. He was then immediately suspended from pay and duty upon the authority of the Assistant Secretary of the Treasury, and charges were preferred against him, and he was furnished with a copy of the charges and was allowed three days for personally answering them in writing, which he did. On April 25, 1914, the Assistant Secretary of the Treasury directed his removal from the service, and in pursuance of that direction he was removed on April 29, 1914.

III.

There has been no evidence taken in this case to show either the willingness or the ability of the plaintiff to perform the duties of the office of inspector of customs from the date of his removal from the service on April 29, 1914. It does not appear that he made any report in person or in writing to the office of the collector of customs in Baltimore.

The plaintiff is the sole owner of this claim, and no assignment or transfer of the same, or any part thereof or interest therein has been made.

10

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the petition herein should be and the same is hereby dismissed. Judgment is rendered in favor of the United States against the plaintiff for the cost of printing the record in this cause in the sum of twenty-eight dollars and seventy-one cents (\$28.71) to be collected by the Clerk as provided by law.

VI. Judgment of the Court.

At a Court of Claims held in the City of Washington on the thirteenth day of May, A. D., 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants and do order, adjudge, and decree that William Scott Norris, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the defendants, the United States; and that the claimant's petition be and it hereby is dismissed; And it is further ordered, adjudged, and decreed that the defendants, the United States, as aforesaid, shall have and recover

of and from the claimant, Wilson Scott Norris, as aforesaid, the sum of Twenty-eight Dollars and seventy-one cents (\$28.71), the cost of printing the record in this cause in this court, to be collected by the Clerk as provided by law.

By THE COURT.

11 *VII. Proceedings Had After Entry of Judgment.*

On June 11, 1918, the claimant filed a motion for new trial and to remand the case to the general docket for the taking of testimony. On June 17, 1918, this motion was overruled by the court.

VIII. *Claimant's Application for and Allowance of an Appeal.*

Comes now the claimant and makes application for an appeal to the Supreme Court of the United States.

SPOOR & RUSSELL,
Attorneys of Record.

DUDLEY & MICHENER, *Counsel.*

Filed July 12, 1918.

Ordered: That the above appeal be allowed as prayed for.
July 16, 1918.

EDWARD K. CAMPBELL,
Chief Justice.

12 Court of Claims of the United States.

No. 33262.

WILSON SCOTT NORRIS

vs.

THE UNITED STATES.

I, Sam'l. A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law filed by the court; of the judgment of the court; of the application of the claimant for, and the allowance of an appeal to the Supreme Court of the United States.

In Testimony Whereof I have hereunto set my hand and affix the seal of said Court at Washington City this 16th day of July, A. D. 1918.

[Seal Court of Claims.]

SAM'L. A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,651. Court of Claims. Term No. 565. Wilson Scott Norris, Appellant, vs. The United States. Filed July 18th, 1918. File No. 26,651.

J. Bradley Tanner,
Chief Clerk.

Fred C. Kleinschmidt,
Assistant Clerk.

Office of the Clerk,
United States Court of Claims,
Washington, D. C.

March 25, 1920.

Supreme Court of the United States, October Term, 1920.

No. 48.

WILSON SCOTT NORRIS, Appellant,

vs.

THE UNITED STATES.

Hon. James D. Maher,
Clerk Supreme Court of the United States.

DEAR SIR:

Pursuant to the order of the Supreme Court of June 2, 1919 I am sending you herewith certified copy of the additional findings of fact and *Per curiam* Memorandum, entered by this court March 8, 1920, with the request that same be embodied in the record on appeal from this court in the above-entitled cause.

Respectfully,

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Court of Claims of the United States.

No. 33262.

WILSON SCOTT NORRIS

v.

THE UNITED STATES.

(Additional Findings of Fact. Announced March 8, 1920.)

This case having been remanded by the Supreme Court of the United States, by an order dated June 2, 1919, for additional findings of fact, the Court of Claims, upon the evidence in said cause, makes the following

Additional Findings of Fact.

The following finding, marked II, is additional to and in amplification of the original Finding II.

II.

The Secretary of the Treasury, having some time prior to August 24, 1911, appointed a committee to examine into, and report upon, the conduct of the customs business at Baltimore, and having instructed that the examination be thorough, vigorous, and exact, embracing the entire customs business, including the personnel, that committee made a report, under date of August 24, 1911, in which it made recommendations relative to the discharge from the service of a number of employees, and reported, among others, as to the plaintiff herein, as follows:

"W. Scott Norris, inspector, is sixty-four years old, and is not a good inspector (see p. 92); he has been suspended and reprimanded several times, and he suffers with rheumatism continually. In our opinion, the inspectors' force would be improved if he were dropped from the rolls."

On February 5, 1913, the Honorable Franklin McVeagh, Secretary of the Treasury, made a memorandum upon, or attached to, said report, in which he stated that he had given most careful consideration to it, and, after conference with the collector and the special agent in charge at Baltimore, and with members of the customs committee, he had reached the conclusions which were indicated after each of the names referred to in the committee's report; and as to the plaintiff, the memorandum stated:

"The committee recommends that he be dropped from the rolls. Recommendation approved."

Thereupon, on February 19, 1913, the Secretary of the Treasury addressed a communication to the collector of customs at Baltimore, in which he said:

"In view of recommendations received by the Department the following changes in the force employed at your port are hereby approved, the appointments to take effect from the dates of new oaths. * * *

"W. Scott Norris, inspector, Class 2, at \$4.00 per diem, to be removed from the service, to take effect upon receipt of this communication, it appearing that he is not a good inspector, that he has been suspended and reprimanded several times, and that he suffers with rheumatism continually."

Upon receipt of that letter the collector at Baltimore, under date of February 20, 1913, addressed a letter to the plaintiff to the effect that he was directed by the Secretary of the Treasury to advise plaintiff that his services as inspector would be dispensed with, and the position vacated by him at the close of business on that day.

Nothing is shown as to what plaintiff did upon receipt of that notice until December 22, 1913, on which day he addressed a communication, from a place called High Peak, Va., to the Secretary of the Treasury, in which he stated:

"On Feby. 20th last, I was dismissed from the Customs Service at the port of Baltimore, in which service I held a position of inspector.

"No reason was assigned for my dismissal, nor were any charges furnished me, nor opportunity to answer given, as provided in section 6, of the postal appropriation act of August 24, 1912.

"My dismissal, therefore, seems contrary to law, and I, therefore, petition you to reinstate me and determine my case on its merits, in the manner prescribed in the above-entitled act."

On January 12, 1914, the department, by the Assistant Secretary, responded to this letter of December 22, and stated to plaintiff that his separation from the service had been directed, after careful consideration of his record in the department, and added:

"As it appears that you were removed without having been furnished with a written copy of the charges, the department is willing to request the Civil Service Commission for the issuance of a certificate to cover your reinstatement, and upon receipt of the same to approve such reinstatement, and then give you a written copy of the charges which led to your separation from the service, as was done in a similar case at the port of Baltimore.

"As you have a legal right to a hearing in the matter, if you insist upon such legal right, the department will follow the course indicated in relation to your reinstatement."

Thereafter, on January 24, 1914, the plaintiff wrote the Secretary of the Treasury, acknowledging receipt of the department's letter of the 12th instant, and said:

"Replying, beg to state that I desire to renew the request for reinstatement, as contained in my letter of the 22d ultimo."

"On February 10, 1914, a communication was addressed by the chief of the division of customs at Baltimore to the Chief of the Division of Appointments of the Treasury Department, requesting the reinstatement of W. Scott Norris as inspector, class 2, \$4 per diem, in the Custom Service at Baltimore, in order that he might be

furnished with a copy of the charges upon which he had been removed, and be allowed to answer the same in accordance with the act of August 24, 1912.

On the same day, February 10, 1914, the Treasury Department, by the Assistant Secretary, addressed a communication to the collector of customs at Baltimore, Md., inclosing therein a letter reinstating the plaintiff as inspector, class 2, and adding:

"Immediately upon Mr. Norris subscribing to the oath of office he will be suspended from duty and pay pending investigation of charges of inefficiency to be preferred against him based upon the report of a committee of special agents which investigated the Customs Service at Baltimore in 1911, and including the part of said report referring to plaintiff as above quoted.

On February 12, 1914, the Treasury Department requested the Civil Service Commission to issue the necessary certificate for the reinstatement of W. Scott Norris as inspector of customs, class 2, at \$4 per diem, in the Customs service at Baltimore, Md., stating that the department desired the reinstatement in order to give Mr. Norris an opportunity to answer the charges against him which resulted in his removal from the service in February, 1913.

On February 16, 1914, the Civil Service Commission issued the order above requested "in order that he may be given an opportunity to answer the charges against him."

On February 20, 1914, the collector of customs at Baltimore, was notified that by direction of the Secretary of the Treasury:

"W. Scott Norris is hereby reinstated and appointed inspector, class 2, new office, with compensation at the rate of \$4 per diem (at Baltimore) in order that he may have an opportunity to answer the charges against him, which resulted in his removal. * * * the appointment to take effect from date of oath."

The plaintiff executed the oath of office on March 5, 1914, of which fact the Secretary of the Treasury was notified by the collector on that date.

On March 9, 1914, the plaintiff made and filed with the collector of customs an extended answer "to the charges contained in department letter, dated February 10th, and submitted by you to me under date of March 5th."

Immediately upon the execution of the oath of office on March 5, the plaintiff was suspended from duty and pay, the charges were preferred against him, and his answer to the charges were forwarded to the Secretary of the Treasury by the collector on March 10, 1914.

On April 25, 1914, the Treasury Department, in a letter signed by the Assistant Secretary, acknowledged receipt of plaintiff's answer to the said charges and considers the answer. The letter concludes:

"In view of the foregoing, after a careful consideration of the charges and the evidence upon which they were based, the department is of the opinion that they were not sufficient to have warranted a dismissal of this officer. Inasmuch, however, as there is no vacancy to be filled at the present time in the force of inspectors at your port, the department can not utilize Mr. Norris' services. The position of inspector was created for him in order that he might take

the oath of office so that these charges could be tried. His services will therefore necessarily be dispensed with, which will be effective upon receipt of this letter by you, and the position abolished. He is eligible for reinstatement within one year, provided his services can be utilized and he is properly recommended for an existing vacancy."

II-A.

The plaintiff's motion for additional findings calls for a finding "whether or not Wilson Scott Norris made, or caused to be made, applications for reinstatement following his second removal, under dates of May 27, 1914, and February 18, 1915."

In answer to that interrogatory, the court finds, from the evidence, the following facts:

Under date of May 27, 1914, a letter was addressed by the president of the National Association of United States Customs Inspectors to the Assistant Secretary of the Treasury, calling attention to the letter above mentioned, of April 25, from the secretary to the collector, and in this letter the president of the association urged the reinstatement of the plaintiff upon the grounds that he had been wrongfully removed, and that the department had concluded that the charges were not sufficient to have justified the removal at the earlier date above mentioned, and stating in his letter: "The sole question then is whether or not the department may find a place for him." The letter urged favorable action toward the reinstatement of the plaintiff.

On June 6, 1914, the Assistant Secretary of the Treasury responded to this letter from the president of the association, to the effect that there was no position of inspector vacant at the port of Baltimore, and the department could not, therefore, utilize the services of plaintiff, and that Mr. Norris was entitled to reinstatement, and should a vacancy occur in which his services could be utilized he would be given consideration.

On February 18, 1915, the plaintiff addressed a letter to the Secretary of the Treasury making application for reinstatement to the position of inspector of customs. Except the letter of May 27, 1914, from the president of the association it does not appear that the plaintiff applied, on that date, or that application was caused to be made by him on that date, for reinstatement.

II-B.

From the testimony taken since the cause was remanded the court finds that the plaintiff, after his dismissal, remained a few months in Baltimore, and then went to a farm in Virginia; that he occasionally visited Baltimore; that he was ready, willing, and able to discharge the duties of customs inspector at the port of Baltimore from the time of his dismissal up to, and including the 20th day of May, 1916, and no facts appear to show that he was not ready, willing, and able to perform the duties at the time of taking his deposition in August, 1919.

The foregoing (Finding H-B) takes the place of the original Finding III.

The plaintiff is the sole owner of this claim, and no assignment or transfer of the same, or any part thereof, has been made.

Memorandum.

Per Curiam:

From the judgment of the Court of Claims in this case, an appeal was taken to the Supreme Court of the United States. The appellant there, who was the plaintiff here, filed a motion to remand the record, with instructions to the Court of Claims to take evidence, by deposition or otherwise, and to certify therefrom the facts therein upon certain points set forth in the motion. The order of the Supreme Court upon that motion is that on consideration of the motion of the appellant to remand this cause to the Court of Claims for further finding of facts, it is ordered that the said motion be, and the same is hereby, granted.

Since that order the plaintiff has taken depositions to prove that he has been ready, willing, and able to discharge the duties of the office from which he was removed. Additional findings of fact have been made.

It has been a long continued practice in the Court of Claims that admissions of fact by a representative of the defendant, made at the bar in course of trial, will not be accepted by the court in the absence of evidence in the record, unless such admissions be by the Attorney General, or his authorized assistant, and in writing.

The reasons for this practice have been stated in decisions. Manifestly, besides other reasons, the court can not be expected to carry such admissions in mind, or subject itself to the criticism of making findings that there is nothing in the record to sustain.

In its attempt to enforce this practice there has now been adopted a Rule of Court which specifically provides that a stipulation shall be in writing, duly signed by designated representatives of the Government, and that otherwise the court will not pay attention to stipulations of attorneys.

This court is in doubt as to whether the order of the Supreme Court is intended as a direction that it shall proceed as upon a new trial. We construe the order as remanding the cause "for further finding of facts."

In another case (Nicholas v. United States, No. 168) in the Supreme Court, an order was made upon a motion to remand the cause for further findings of fact. The motion was granted "and the Court of Claims is directed to set aside its judgment and reopen the case."

In the absence of an order directly setting aside the judgment from which the appeal was prosecuted, or directing this court to set it aside, it is our view that we can not set aside the judgment because of the time that has elapsed since its rendition, and, because further, the appeal removed the case from this court to the Supreme Court.

We therefore think that our jurisdiction in the matter is limited

to making findings of fact upon the points stated in the motion, and certifying the same. If the judgment were set aside we would have to treat the matter as upon a new trial; but in the present condition of the record, as we view it, the appeal is in the Supreme Court.

The clerk will be ordered to certify a copy of the additional findings and this memorandum to constitute a part of the record in the case.

BY THE COURT.

Filed March 8, 1920.

A true copy:

Test this March 25, 1920.

[Seal Court of Claims.]

F. C. KLEINSCHMIDT,

Asst. Clerk Court of Claims.

[Endorsed:] File No. 26,651. Supreme Court U. S., October Term, 1920. Term No. 48. Wilson Scott Norris, Appellant, vs. The United States. Certified copy of additional findings of fact and per curiam opinion of the Court of Claims. Filed March 27, 1920.

(1760)



Supreme Court, U. S.
FILED

MAY 5 1919

JAMES D. MAHER,

CLERK.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1918. No.  11

WILSON SCOTT NORRIS,

Appellant,

vs.

THE UNITED STATES.

Appeal from the Court of Claims.

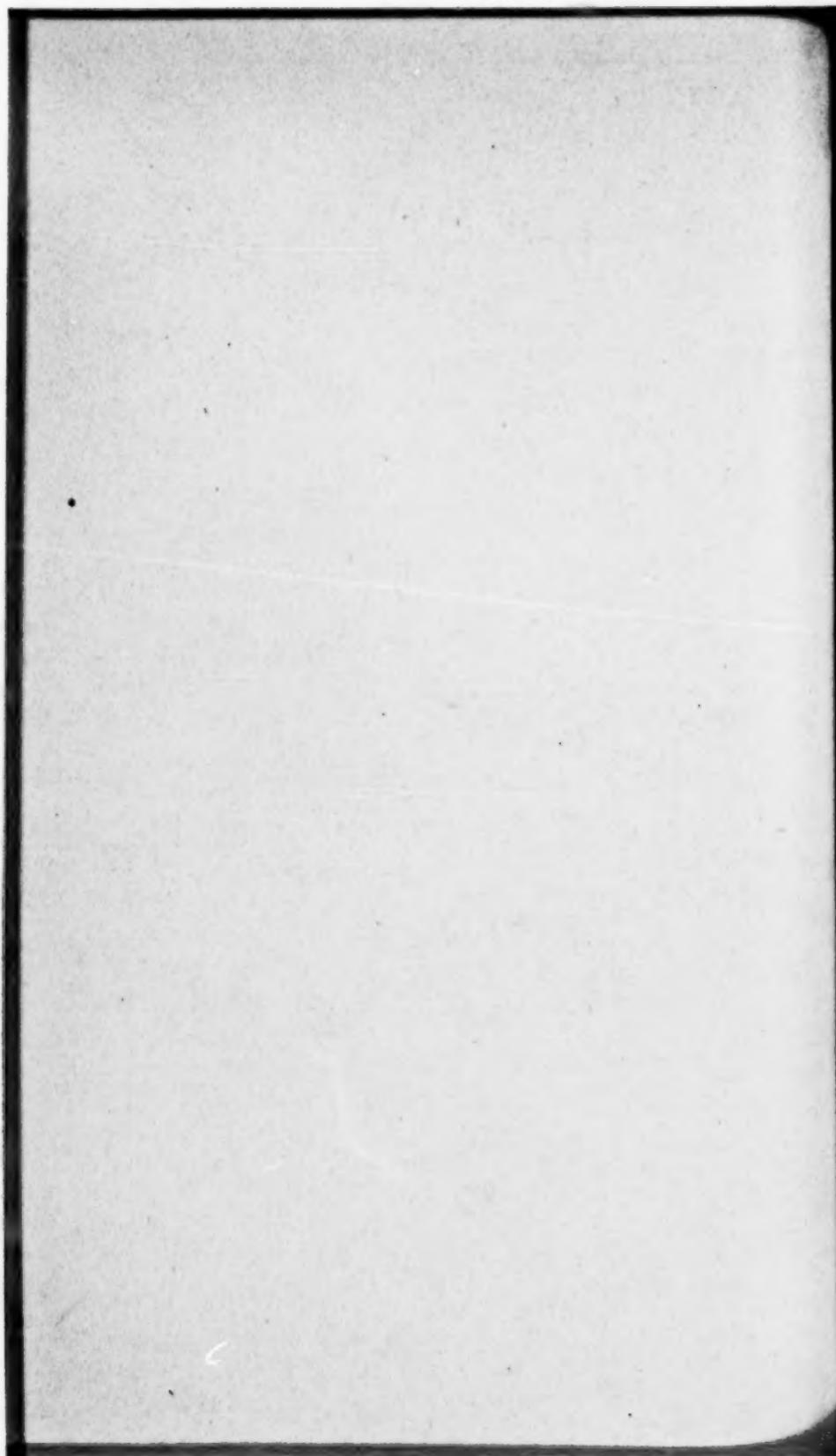
Motion and
**BRIEF IN SUPPORT OF APPELLANT'S MOTION
FOR REMANDING OF RECORD.**

WILLIAM E. RUSSELL,

LOUIS T. MICHENER,

PERRY G. MICHENER,

Attorneys for Appellant.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

WILSON SCOTT NORRIS,
Appellant,
vs.
THE UNITED STATES.

} No. 565.

APPEAL FROM THE COURT OF CLAIMS.

Appellant's Motion for Remanding of Record.

Brief in Support of Motion.

Now comes the appellant and moves the Court to remand the record in this case to the Court of Claims, with instructions to that Court to take evidence by deposition or otherwise, and to certify therefrom the facts bearing upon the following points:

1. Whether or not the charges mentioned in Finding II (R. 5) were held to be sufficient to have warranted the removal of Wilson Scott Norris on February 20, 1913.

2. Whether or not Wilson Scott Norris made, or caused to be made applications for reinstatement following his second removal, under dates of May 27, 1914, and February 18, 1915.

3. Whether or not Wilson Scott Norris stood ready, willing and able to perform the duties of his office as inspector of customs during all the time covered by this action.

Appellant shows to the Court that there was no contradictory or conflicting evidence in the Court of Claims on the above points.

With reference to the first point above mentioned, appellant shows that the charges preferred against him on his restoration to office on March 5, 1914, were not sustained when the opportunity was afforded him at that late date of answering same. The evidence in the court below on this point consisted of a letter written by the Treasury Department to the Collector of Customs at Baltimore as follows:

"Treasury Department,
Washington, April 25, 1914.

Collector of Customs,
Baltimore, Md.

Sir: The department is in receipt of your letter of the 10th ultimo transmitting the answer of W. Scott Norris, inspector, Class 2, of your port, in response to charges preferred against him under the department's instructions of February 10, last.

Mr. Norris was dismissed from the service without trial in accordance with the civil service rules and regulations upon a recommendation made by a committee of special agents that examined your port in 1911, the charge preferred against this officer being as follows:

'W. Scott Norris, inspector, is 64 years old, and is not a good inspector; he has been sus-

pended and reprimanded several times, and he suffers with rheumatism continually.'

The fact that Mr. Norris may have reached the age of 64 is not an element in considering whether he should be retained as an inspector, unless, by reason of his age, he has become physically incapacitated from performing the duties of his position. It appears that Mr. Norris was suspended in January, 1908, for five days for neglecting to notify district officers at points of destination of the intended arrival of scows containing imported merchandise and that he neglected to send proper papers with such scows; that he was suspended in January, 1911, for five days for failure to obtain the proper numbers of cars loaded with ferromanganese; that on November 5, 1908, he was reprimanded for an error in his returns of unloading, and on January 18, 1909, again reprimanded for a similar error; that on July 3, 1909, he was reprimanded for sending forward a scow manifest without giving the marks and numbers in detail of each bale of burlap contained thereon; that on January 13, 1910, he was cautioned for an incorrect delivery of cork-wood to an importer, instead of sending same to general order; that on February 5, 1910, he was cautioned for failing to notify the office of bad-order condition of certain liquors; and that on July 7, 1910, his attention was called to an error on an I. T. shipment due to a confusion of marks.

As all these transactions were disposed of by what was deemed the proper action in each case, the department is of the opinion that they should not be considered except in connection with a trial of Mr. Norris for some dereliction of duty in arriving at a decision as to the proper punishment to be imposed. They will, therefore, not be further considered in the present case.

With respect to the charge that this officer suffered from sciatic rheumatism continually, it

appears that he had taken only 20 days' sick leave in 10 years, and he submits that what little rheumatism he has suffered with was brought about by exposure in the performance of official duties in connection with the discharge of vessels at night. He also submits a certificate from his physician, in which it is stated that while he has treated Mr. Norris on several occasions for sciatic rheumatism, this ailment was not at all chronic, and that he was not at any time incapacitated for a period of longer than three or four days, and that he is now physically able to perform a day's labor.

In view of the foregoing, after a careful consideration of the charges and the evidence upon which they were based, the department is of the opinion that they were not sufficient to have warranted a dismissal of this officer. Inasmuch, however, as there is no vacancy to be filled at the present time in the force of inspectors at your port, the department cannot utilize Mr. Norris's services. The position of inspector was created for him in order that he might take the oath of office so that these charges could be tried. His services will, therefore, necessarily be dispensed with, which will be effective upon receipt of this letter by you, and the position abolished. He is eligible for reinstatement within one year, provided his services can be utilized, and he is properly recommended for an existing vacancy.

Respectfully,

(Signed) WILLIAM P. MALBURN,
No inclosures Assistant Secretary."

There was no conflicting or contradictory evidence in the record below with reference to the contents of the foregoing letter. This letter was put in evidence by appellant to support the averment in paragraph V of the petition (R. 2, top of page). Appellant duly requested the Court below to find as a fact that the

charges had not been sustained. This request was contained in Claimant's Requests for Findings of Facts, No. V, in the following language:

"Claimant duly submitted his answer to the charges, and after due consideration thereof the Assistant Secretary of the Treasury on April 25th, 1914, advised the Collector of Customs of the Port of Baltimore by letter that the charges had not been sustained and that claimant should not have been removed."

The Court below failed or refused to find the foregoing but did find that appellant was again removed, Finding II, (R. 5). Appellant submits that it is most important that this Court be advised as to whether or not the charges were sustained. As the record stands, Finding II, (R. 5), the inference is irresistible that appellant was found guilty of the charges. Justice calls for an answer on this request, because the fact is that appellant was acquitted of the charges.

As to the second point, appellant shows that, following his second removal on April 29, 1914, at least two written requests were made for his reinstatement. The evidence in the court below consisted of letters addressed to the Secretary of the Treasury and dated May 27, 1914, and February 18, 1915, respectively. These letters were part of the record and were not contradicted. The Court below certified to this Court, Finding III, (R. 5), that there was no evidence to show the willingness or the ability of appellant to perform the duties of his office after the aforesaid second removal. The letters herein referred to are directly at variance with Finding III. Proper averment of these requests for reinstatement was made in the petition, paragraph V, (R. 2), and a request for such a finding was duly made in the Court below, the evidence supporting such request having theretofore been taken.

Concerning the third point, appellant shows that the petition alleges in paragraph 7th thereof (R. 2):

"During all the time from the date of claimant's removal on February 20, 1913, as heretofore alleged, claimant has stood ready, willing and able to perform the duties of the office to which he was legally appointed, and from which he was illegally separated. Claimant avers that he has been prevented from performing the duties of said office by direction of the Secretary of the Treasury, or his subordinates."

The petition was filed in the Court of Claims on May 23, 1916 (R. 1) and thereafter various departmental reports were filed constituting the evidence in the case. Under date of March 30, 1917, appellant, by his counsel, caused to be prepared a motion to be filed in the Court of Claims containing a stipulation in writing, which said motion was for the purpose of taking the testimony of the claimant in answer to certain written interrogatories, one of them reading as follows:

"Since the 20th day of February, 1913, the date of your removal, have you or not, at all times stood ready, willing and able to perform the duties of the office of inspector of customs?"

The stipulation mentioned above, to which was annexed the interrogatories, was presented for approval to the attorney of the United States representing the defense in this case, for his approval and signature. The attorney for the United States read the stipulation and interrogatories and then and there stated that he would not agree to approve or sign even as to the question whether or not the claimant stood ready, willing and able to perform the duties of his office. The attorney for the Government gave as his reasons therefor that he did not wish to encumber the record.

and he argued that the record showed persistent attempts on the part of the claimant to effect his reinstatement, thereby showing in a most conclusive way his readiness and willingness to serve. Counsel for claimant contended to the attorney for the Government that the Court might ask why claimant had not proven affirmatively his readiness, willingness and ability to perform the duties of his office. The Government's attorney replied that if the Court did that he would rise and say that there was sufficient proof in the record and that the Government conceded as a fact, that claimant was ready, willing and able to perform the duties of the office. Relying upon this statement of the defense, appellant did not press the motion for the taking of testimony on this point.

This case, together with two other cases, involving the same law questions, were argued together before the Court of Claims on March 6, 1918. It was agreed between counsel on both sides and the Court that the argument of the law questions involved in the three cases should be made in this case, but with the understanding that the said argument should apply to the other two cases. On the 5th day of March, 1918, counsel for appellant called to the attention of the attorney for the Government that he had objected to claimant's request for Finding VII heretofore set forth. The objection in the brief of the Government to this finding was as follows:

"Objected to because not supported by the evidence. It is conceded that there is a very strong inference that plaintiff stood ready, willing and able to perform, but there is no competent evidence of this fact."

Counsel for appellant thereupon brought to the attention of the attorney for the Government the oral agreement heretofore mentioned as having been made on March 30th, 1917. The Government's attorney

then stated that he regretted having made the objection, and in explanation thereof further stated that the conversation mentioned had passed out of his mind temporarily, but he then recalled it and said that on the argument the next day, in open court, he would express his regret to the Court and for the benefit of the record would concede that the claimant stood ready, willing and able to perform the duties of his office. When this case was called for argument the following day the Government's attorney arose and informed the Court of the oral agreement of March 30, 1917, and then and there stated for the benefit of the record:

"That the Government conceded that the claimant would have testified in answer to a written interrogatory that 'he was ready, willing and able at all times to perform the duties of his office.' "

This case was thereupon argued upon the various questions involved, the Court below making no comment on, or objection to this concession on the part of the Government.

Appellant's petition was dismissed for the reason, as it appears in Finding III (R. 5), that there was no evidence to show the willingness or the ability of appellant to perform the duties of his office.

Since his removal appellant has stood ready, willing and able at all times to perform the duties of his office and would have so testified in answer to the interrogatory heretofore mentioned and will so testify if given an opportunity by this Court.

Appellant further shows to the Court that on June 11, 1918, claimant filed a motion in the court below for a new trial (R. 6) and for a remanding of the case to the General Docket for the taking of testimony. The Court below overruled this motion on June 17, 1918. In this motion for a new trial ap-

pellant caused to be submitted the affidavits of himself, of his counsel, Louis T. Michener, and of his attorney of record, William E. Russell. These affidavits set forth in detail the oral agreement made with the attorney for the Government with reference to the question concerning appellant's readiness, willingness and ability to perform the duties of his office. The attorney for the United States filed a statement in reply to the aforesaid motion admitting therein that on the argument of the case he had made the concession heretofore set forth. Nevertheless, the motion was denied. Had the motion been allowed evidence would have been taken and it would have been proven that claimant stood ready, willing and able to perform the duties of his office.

WILSON SCOTT NORRIS,

Wm. E. Russell, Appellant.
 Louis T. Michener,
 Perry G. Michener,
 Attorneys for Appellant.

State of Virginia, } ss:
 County of Floyd,

Personally appeared before me, a notary public in and for the County of Floyd, Wilson Scott Norris, who, being duly sworn according to law, deposes and says: That he is the appellant in the above-entitled case; that he has read the foregoing motion and understands its contents, and that the matters and things therein stated are true in substance and in fact as he is informed and verily believes.

WILSON SCOTT NORRIS.

Subscribed and sworn to before me
 this 22 day of April, 1919.

D. S. Lucas,

Notary Public.

My commission expires Jan. 14, 1922.
 (Seal.)

Appellant's Brief on Motion to Re-mand Record.**Nature of Action.**

This action is to recover the salary due Wilson Scott Norris as inspector of customs in the Port of Baltimore, at the rate of \$4 per diem from February 20, 1913, to and including September 30, 1917. Appellant was appointed inspector on the 2nd day of July, 1907. He continued under this appointment to the 20th day of February, 1913. On this latter date he was summarily and arbitrarily removed without charges and in violation of the rules of the Civil Service Commission, the Customs Laws and Regulations and the Act of Congress of August 24, 1912, (37 Stat. 555).

No charges were furnished appellant, nor was he allowed a reasonable time for personally answering same in writing (R. 4, 5).

On March 5, 1914, appellant was restored to his office by the Secretary of the Treasury, but was immediately suspended and charges in writing handed him, and he was allowed three days to make answer thereto in writing. Appellant submitted his written answer to the charges within the three days, and thereafter and on the 25th day of April, 1914, the Assistant Secretary of the Treasury directed that appellant should be removed from the service. This second dismissal was accomplished, pursuant to the aforesaid order of the Assistant Secretary of the Treasury, on April 29, 1914.

Argument.

I.

Appellant's first removal on February 20, 1913, was an absolute nullity, being unlawful, invalid and of no force and effect because it was contrary to the Civil Service Rules, the Customs Laws and Regulations and the Acts of Congress. Civil Service Rule No. XII, Section 2, as amended by executive order of February 8, 1912, was in effect at the time of this first removal. We set forth in part the aforesaid rule:

"A person in the competitive service whose removal is proposed, shall be furnished with a statement of reasons and be allowed a reasonable time for personally answering such reasons in writing * * *"

This rule was promulgated in the Treasury Department by T. D. No. 32,265 on February 12, 1912.

The Customs Laws and Regulations of 1908 were also in effect on the aforesaid date. Article 1385 of said regulations provides in part, as follows:

"No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the department or with another appointing officer, of which the accused shall have full notice and an opportunity to make defense."

Article 1386 of the aforesaid regulations provides in part as follows:

"At the same time a complete copy of the charges and specifications will be furnished to the accused, with the information that such defense as is desired to be made in the premises must be submitted to the supervising officer for transmission to the Secretary of the Treasury within three days from date of receipt of the copy of the written charges."

There was also in effect at the time of his removal the Act of August 24, 1912, 37 Stat. 555, in part as follows:

"Section 6. That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service, and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing, and affidavits in support thereof: * * *."

There was no attempt made by the Treasury Department to comply with any of the foregoing requirements and appellant was arbitrarily, unlawfully and without notice removed from his office. *United States v. Wickersham*, 201 U. S. 390; *United States, ex rel. Newcomer v. Postmaster*, 221 Fed. 687.

II.

Appellant's second removal was also invalid. In the first place appellant, having been acquitted of the charges, was entitled to restoration of his office. In the second place, *his second removal was invalid because the Assistant Secretary of the Treasury has no power of removal*. Only the appointing power has the power to remove, and it appears in this case that the second removal was not even ordered by the *appointing power*, viz: *The Secretary of the Treasury*, but was made pursuant to an order issued by the Assistant Secretary of the Treasury. A suspension from duty and pay or removal can only be made by the appointing officer. *Lellman vs. United States*, 37 C.

Cl. 128; *Beuhring v. United States*, 45 C. Cls. 404; *Blake v. United States*, 103 U. S. 227; *Keim v. United States*, 177 U. S. 290. Subordinate customs officials are removable only by the Secretary of the Treasury. Art. 1385, Customs Laws and Regulations of 1908.

III.

As both the first and second removals were invalid, appellant was never lawfully removed, and it follows that he is entitled to the salary of his office. The authorities are numerous and harmonious on this point.

- Fitzsimmons v. Brooklyn*, 102 N. Y. 536.
- United States v. Wickersham*, 201 U. S. 390.
- Garvey v. Lowell*, 199 Mass. 47.
- Tucker v. Boston*, 223 *ib.* 478.
- Andrews v. Portland*, 79 Me. 484.
- Everill v. Swan*, 20 Utah 56.
- Houston v. Estes*, 35 Tex. Civ. App. 99.
- State ex rel. Dennison v. St. Louis*, 90 Mo. 19.
- Leonard v. Terra Haute*, 93 N. E. 872.
- Seifen v. Racine*, 129 Wis. 343.
- People v. Stevenson*, 272 Ill. 215.

The foregoing cases agree that the salary of an office is an incident thereof and that the legal title to the office carries the right of salary with it.

The Wickersham case, *supra*, was similar to the instant case as it involved a removal without charges. This Court held that the removal was a nullity and that Wickersham was entitled to the salary of his office during the period of removal.

IV.

We do not understand that the rule has ever been established that a public officer, who has been unlawfully removed must prove affirmatively that he was ready, willing and able to perform the duties of his office during the period of removal in order to recover the salary thereof. If the salary attaches to the office as an incident thereof, it would seem to follow that he who holds legal title thereto must be entitled to the salary. Therefore, readiness, willingness and ability are presumed, on the part of one who is an officer "*de jure*." There are many cases that hold that a claimant for the salary of an office, may still recover same even though he had other employment during the period of unlawful removal. In the Fitzsimmons case (*supra*), the claimant had other employment and received another salary during the time he was ousted from his office, but he was awarded the salary of his office on the ground that "the salary attached thereto as an incident thereof." The same conditions existed and the same rule was followed in

State ex rel. Chapman v. Walbridge, 153 Mo. 194.

Houston v. Estes (*supra*).

Everill v. Swan (*supra*).

V.

If, however, it should be deemed necessary that appellant prove his willingness, readiness and ability to perform the duties of his office as a condition of recovery, it is respectfully submitted that the concession made by the attorney for the Government, as heretofore alleged, was competent evidence and sustained the averments of paragraph 7th of the petition heretofore set forth. Appellant feels that he has been aggrieved by the action of the Court below in dismissing the petition when counsel for the Government made the concession as set forth herein, and for the further reason that the Court below failed to certify that appellant was acquitted of the charges. Therefore, appellant submits if this Court deems this point material, that this case should be remanded to the Court below with instructions to take evidence on the point, and certify the facts to this Court. We submit and state to the Court that there was no conflicting evidence in the Court below, and that the findings are incomplete and inconclusive. We submit that these deficiencies in the findings can be remedied and justice done to both parties hereto by remanding the record to the Court below, with instructions to find and certify as requested by the motion.

Certificate.

We, as appellant's counsel, hereby certify that in our opinion this motion for a remanding of the record is well founded in law, is in the interest of justice, and is not interposed for the purposes of delay.

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.